IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 8TH MARCH 2007 / 17TH PHALGUNA 1928

SA.No. 82 of 1993()

AS.154/1984 of D.C. & SESSIONS COURT, ERNAKULAM
OS.193/1982 of MUNSIFF COURT,MUVATTUPUZHA
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APPELLANTS: (APPELLANTS 2 AND 3/2ND PLAINTIFF
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1. POULOSE GEORGE
   PONNACHIYIL HOUSE
   RANDAR KARA, MUVATTUPUZHA VILLAGE
   MUVATTUPUZHA TALUK.

2. ANNAMMA, W/O.PAILY POULOSE
   PONNACHIYIL HOUSE
   RANDAR KARA, MUVATTUPUZHA VILLAGE
   MUVATTUPUZHA TALUK.
   (DIED. RECORDED VIDE ORDER DT. 2.2.07 IN
   MEMO FILED BY APPELLANT.) IT IS RECORDED THAT SECOND APPELLANT DIED AND THE RIGHT OF THE SECOND APPELLANT DEVOLVING ON THE FIRST APPELLANT VIDE ORDER (IN MEMO) DT. 02.02.07.

   BY ADV. SRI M.C.CHERIAN
   " SARAMMA CHERIAN
   " ALEXANDER JOSEPH
   " BABU MATHEW

RESPONDENTS:-(RESPONDENTS/DEFENDANTS)
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1. THE STATE OF KERALA.
2. THE TALUK LAND BOARD, MUVATTUPUZHA.
3. THE TAHSILDAR, MUVATTUPUZHA.
4. IYPE JOSEPH, MANKUZHIPUTHENPURAYIL
   PAIKATTU, RANDAR KARA, MUVATTUPUZHA.

5. OUSEPH VARKEY, THEVALATHIL, PERINGAZHA KARA
   MUVATTUPUZHA, MUVATTUPUZHA P.O.
6. PATHUMMA, KATTUMKUDI HOUSE,
   NEAR NIRMALA COLLEGE, MUVATTUPUZHA
   (THODUPUZHA ROAD SIDE)
7. AYYAPPAN KUNJUKUNJU, PANTHILAKKATTUMALIKAYIL
   NEAR NIRMALA COLLEGE, MUVATTUPUZHA.
8. MARIAM UMMA, PANTHALAKKATTU

NEAR NIRMALA COLLEGE, MUVATTUPUZHA.

9. P.C.KUMARAN, PANTHALAKKATTUMALIKAYIL
NEAR NIRMALA COLLEGE, MUVATTUPUZHA.
10. KUNJUKUNJU AYYAPPAN, PANTHILKATTU HOUSE,
NEAR NIRMALA COLLEGE, MUVATTUPUZA.

11. K.NARAYANAN, MANAYATHUPUTHENPEDIKAYIL
KARIMATTOM, ENANALLOOR , AYAVANA P.O.
MUVATTUPUZHA.
12. OUSEPH JOSEPH, PERINGATHU HOUSE
VAZHAKULAM P.O. MUVATTUPUZHA.

BY GOVERNMENT PLEADER SRI.S.DILEEP FOR R1 TO R3

BY ADV.SRI. ANANTHASUBRAMANYAM FOR R4

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 08/03/2007 THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:-

M.SASIDHARAN NAMBIAR,J.

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S.A. NO.82 OF 1993

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Dated this the 7th day of March 2007

JUDGMENT

Plaintiffs in O.S.193/82 on the file of Munsiff Court, Muvattupuzha are the appellants. Respondents are the defendants. Suit was filed for a declaration that the order in C.R.P.826/75 dated 5.2.1976 is not binding on the plaintiffs or the plaint schedule property and for a permanent prohibitory injunction restraining defendants from interfering with the peaceful possession and enjoyment of the plaint schedule property and alternatively for recovery of possession of the property in case it is found that defendants are in possession of the property. Taluk Land Board initiated proceedings under section 85 (8) of Kerala Land Reforms Act against fourth defendant finding that he is in possession of excess land than the ceiling area. A notice was issued to the appellants also in that ceiling case. Appellants

appeared and contended that plaint schedule property was purchased by first appellant and his brother Krishna Iyer on 25.2.1115(M.E.) and 22.6.1115 (M.E.) and on 2.7.1120 the said four acres were partitioned between the first appellant and his brother and plaint schedule property was allotted to him and since then it has been in his possession and enjoyment and therefore fourth defendant had no right over the property and it cannot be included within the ceiling area of the fourth defendant and hence it is to be excluded. The fourth defendant filed a statement opting to surrender the plaint schedule properties. Taluk Land Board directed to surrender possession of the excess area. The properties directed to be surrendered were not the properties opted by fourth defendant. The order of the Taluk Land Board was challenged before this court in C.R.P. No.826/75. In the said C.R.P. fourth defendant did not implead appellants. Appellants were also not heard by this court when C.R.P. 826/75 was

disposed. This court as per order dated 5.2.1976 in that C.R.P. held that Taluk Land Board should not have disregarded the option filed by the declarant fourth defendant and therefore directed Taluk Land Board to accept the option tendered by the declarant. The grievance of appellants was that their objections raised before Taluk Land Board were not considered by this court while directing to accept the option made by fourth defendant and directed to take possession of the plaint schedule property accepting the option made by fourth respondent. According to appellants, the order is not binding on them and is invalid. Realising that this court has passed the order against the properties of appellants, without hearing them appellants filed R.P. 8/78 to review the order in C.R.P.826/75. Under Ext.A6 order, this court dismissed the review petition leaving appellants to seek appropriate remedy. It is thereafter appellants instituted O.S.193/82 before Munsiff Court, Moovattupuzha. Respondents 4 to 12

are the persons to whom the properties were allegedly distributed by the State. Fourth defendant filed a written statement contending that the decision of the Taluk Land Board as modified by this court in C.R.P.826/75 is valid and appellants have no right to challenge the same and they are not entitled to the decree sought for. Defendants 6 to 10 and 12 filed a written statement contending that they did not know the rights of appellants and the plaint schedule property is the excess land declared by the Taluk Land Board and after verifying the application filed by those defendants properties were given to them and they have taken possession of the property and deposited the purchase price fixed by the Government and appellants are not entitled to the decree sought for. Learned Munsiff framed the necessary issues. On the evidence of PW1 and Dws 1 to 3 and Exts.A1 to A7, B1 to B7, X1 to X3 learned Munsiff found that the order in C.R.P.826/75 was fraudulently obtained by fourth defendant. But holding that

under section 85(8) of Kerala Land Reforms Act appellants have an alternative remedy, the suit was dismissed. Challenging the dismissal of the suit plaintiffs filed A.S.154/84 before Additional District Court, Ernakulam. When appeal was pending, appellants in view of the finding of learned Munsiff that they have a remedy under section 85(8) of Kerala Land Reforms Act, approached the Taluk Land Board to consider their claim. Under Ext.A9 order the petition was dismissed as not maintainable. In view of the finding of the learned Munsiff that defendants 5 to 12 are in possession of the property and to prove that possession continued with the appellants, they applied for a Commission. First appellate court appointed a commission and Commissioner submitted a report. The learned Additional district judge on reappreciation of evidence confirmed the finding of the learned Munsiff that the remedy available to the appellants is only under section 85(8) of the Kerala Land Reforms Act and therefore the suit is

not maintainable and dismissed the appeal. It is challenging the concurrent findings Second Appeal was filed.

2. The second appeal was admitted formulating the following substantial questions of law.

1) Was the court below correct in dismissing the suit after finding that the fourth respondent obtained the order from this court in C.R.P. 826/75 by playing fraud?

2) Whether the order in C.R.P.826/75 procured without impleading the appellants is binding on the appellants and if so, whether the subsequent proceedings initiated by Taluk Land Board pursuant to the order is sustainable?

3. Learned Munsiff and learned District Judge after elaborate discussion of the facts found that fourth respondent filed C.R.P.826/75 without impleading appellants and without disclosing the true facts and obtained an order directing the Taluk Land Board to accept the option submitted by him. It was found that the order was obtained by

playing fraud on the court. That factual finding is fully supported by the evidence. Fourth respondent is aware of the fact that the property which he has opted to surrender and which he persuaded this court to accept, was the property in the possession of the appellants which was considered by the Taluk Land Board before the earlier order was passed. Inspite of the exclusive claim over the properties raised by appellant fourth respondent did not disclose that fact in the C.R.P and did not implead them. It was not revealed to this court that appellants herein had raised independent claim over that property. In such circumstances,without deciding the claim raised by appellants it is not possible to accept the option of surrender made by fourth defendant. Eventhough the finding of fraud was entered into by the trial court, that portion of the finding was not challenged before the first Appellate Court by filing a Cross Objection. Eventhough notice was served on the fourth respondent, he did not appear

in the second appeal.Therefore the finding of fact that the order in C.R.P.826/75 is the result of fraud can only be upheld.

4. As observed by De Grey,C.J in **Rex** v. **Duchess of Kingston (2 Smith LC 687)** "Fraud" is an intrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts ecclesiastical and temporal." The law in India is not different. Section 44 of Evidence Act enables a party, otherwise bound by a previous adjudication, to show that it was not final or binding because it is vitiated by fraud. It is always competent to any court to vacate any judgment or order if it is proved that such judgment or order was obtained by manifest fraud. **(Paranjpe v. Kanade (ILR 6 Bombay 1481).** Apex Court in **Chengalvaraya Naidu v. Jagannath (1993) Supp.3SCR 422)** held:

> "It is the settled proposition of law that

> a judgment or decree obtained by playing fraud on the court is a nullity and nonest in the eyes of law. Such a judgment/decree by the first court or by the highest court has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

The result is that the order in C.R.P.826/75 obtained by fourth defendant by playing fraud on the court is to be treated as nonest in the eyes of law as against appellants.

5. When it is established that the order in C.R.P.826/75 is the result of fraud played on this

court, it is necessarily to be found that the order has no value and is not binding on appellants. The grievance of the appellants were that eventhough appellants filed a review petition to review the order in C.R.P.826/75, the petition was dismissed holding that the remedy of the appellants is elsewhere and the courts below held that the remedy is under section 85(8) of the Kerala Land Reforms Act and when appellants approached the Taluk Land Board subsequent to the dismissal of the suit, that was also dismissed and in such circumstance they have no other remedy and the properties of the appellants cannot be interfered. There is force in the submission. When the order passed by this court directing to accept the option filed by the fourth defendant is found to be vitiated by fraud played on the court, without hearing the appellants on the rights claimed by them, the property cannot be taken possession of. In such circumstances the dismissal of the suit is illegal.

The Second Appeal is therefore allowed. The decree and judgment passed by learned Munsiff in O.S.193/82 and learned District Judge in A.S.154/84 are set aside. A decree is passed in O.S.193/82 as follows:- The order in C.R.P. 826/75 is not binding on the appellants. The Taluk Land Board is directed to consider the claim raised by appellants in respect of the plaint schedule properties basing Ext.A1, A2, A7 and A10. The Taluk Land Board has to decide whether plaint schedule properties belong to appellants under the title deeds as claimed. If it is found that the properties belong to appellants Taluk Land Board is at liberty to proceed against fourth respondent directing to surrender other excess land ignoring the option submitted by fourth defendant. The Taluk Land Board has to decide the question after hearing the appellants within six months from the date of receipt of a copy of this judgment.

M.SASIDHARAN NAMBIAR

JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A..NO.82 /1993

JUDGMENT

7th MARCH, 2007